

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD.

CIVIL REVISION APPLICATION No 1605 of 1998

For Approval and Signature :

Hon'ble MR. JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the Order ?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the Order ?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

ROSHANLAL FULCHAND SHARMA
VERSUS
OMPRAKASH LABHURAM CHOPRA

Appearance:

MR AY KOGZE for MR CK PANDYA for Petitioners

CORAM : MR JUSTICE S.K. KESHOTE
Date of decision: 03/02/1999

C.A.V. ORDER

1. Relying on the decision of Calcutta High Court in the case of Laxmi Mani Dasi vs. Manikchandra Das

reported in AIR 1991 Cal. 231 and of Andhra Pradesh High Court in the case of Narsamma vs. Venkatraman reported in AIR 1965 AP 12, learned counsel for the petitioners contended that the learned trial court has committed serious illegality in not trying the issue of res-judicata as a preliminary issue in the suit out of which this revision application has arisen.

2. I have given my thoughtful consideration to the submissions made by the learned counsel for the petitioners and perused the impugned order.

3. The issue of res-judicata has been framed on the application of the defendants-petitioners when the examination-in-chief and cross-examination of the plaintiff was completed. So it is an additional issue framed on the application of the defendants-petitioners after the completion of plaintiff's statements. Initially this plea has not been raised by the defendants-petitioners. This plea of res-judicata is sought to be raised by amendment of written statement and naturally when it is granted, additional issue has to be framed. After framing of the additional issue, insistence has been made by the learned counsel for the defendants-petitioners for deciding of this issue as preliminary issue. I find sufficient justification in the approach of the learned trial court that it is a discretion of the trial court to decide an issue as a preliminary issue under Order 14 Rule 2, C.P.C.. So in a given case if the court is satisfied that at the stage when this issue is sought to be raised and prayed for to be tried as preliminary issue in appropriate case it may decline to try it as a preliminary issue even if it falls under the category of issue which relates to jurisdiction of court or the suit is barred under some statutory provision. The decisions of Calcutta High Court and Andhra Pradesh High Court are of little help to the defendants-petitioners in this case. Each case has to be decided with reference to its own facts and in the facts of this case, those cases are clearly of little help to the petitioners.

4. There is yet another aspect of the matter and if it is looked into therefrom it also goes to support my view of not to interfere with the order impugned in this civil revision application. The issue of res-judicata is not as a pure question of jurisdiction or of law. It is an issue of mixed question of law and facts and on facts being established the court shall apply the principle of res-judicata. So to establish that fact the evidence has to be recorded. Learned counsel for

the defendants-petitioners admitted that to decide the issue of res-judicata the evidence has to be recorded but what he contended that the recording of evidence on other issues should have been deferred by the learned trial court and after recording the evidence on issue of res-judicata it has to be decided as a preliminary issue but I do not find any substance in this contention. In a case where the evidence has to be recorded even to decide the question of jurisdiction or res-judicata, the trial court may be perfectly legal and justified in appropriate case to decide all the issues together. If we go by the scheme of Order 14 of the Code I find that the legislature's intendment is that all the issues have to be decided together and only in exceptional case which falls in the category of as given out in the provision, the issue relating thereto may be decided as a preliminary issue. In the facts of the present case, it is a just and reasonable that the trial court declined to decide it as a preliminary issue. The statements of the plaintiff has already been completed and the evidence on this issue may also be recorded along with other issues and then the Court shall decide all the issues together and in case the defendants-petitioners are able to make out their case of res-judicata accordingly the court will take the matter and decide it. In the present case, the learned trial court's approach cannot be said to be perverse or arbitrary. It is not the case were it falls under any of the clauses (a), (b) or (c) of subsection (1) of section 115, C.P.C. Not only this, in case this order is allowed to stand it will not occasion any failure of justice or will cause any irreparable injury to the defendants-petitioners. At the most it may be a case were the ultimate decision may take one or two months more in deciding this issue and which is hardly of any substance and matter more so when the intendment of legislature is that there should not be any piecemeal decision on issues framed in the suit.

5. In the result, this civil revision application fails and the same is dismissed.

(S.K.Keshote,J)

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